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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1349

PAUL CLYDE VILLANO and PAULINE SMALDONE,
Petitioners,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Tenth Circuit

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INDEX

Page

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Constitutional Provisions and Statutes Involved 3

Statement 6

Reasons for Granting the Writ 12

I. Sufficiency of the evidence 12

II. Illegal electronic surveillance 20

III. Prejudicial publicity 26

IV. Double jeopardy (prior state charges) 29

V. Telephone voice identification 31

Conclusion 34

Appendix A—Opinion of Court of Appeals, dated January 8, 1976 ..... A-1

Appendix B—Judgment of Court of Appeals, dated January 8, 1976, re Villano A-27

Appendix C—Judgment of Court of Appeals, dated January 8, 1976, re Smaldone A-29

Appendix D—Order of Court of Appeals, dated February 17, 1976, denying rehearing A-31

Cases

Alderman v. United States, 394 U.S. 165 (1969) 2, 22

Ashe v. Swenson, 397 U.S. 436 (1970) 30

Baker v. Hudspeth, 129 F. 2d 779 (10th Cir. 1942) 27

Chapman v. California, 386 U.S. 18 (1967) 26
Cwach v. United States, 212 F. 2d 520 (8th Cir. 1954).. 33

Dennis v. United States, 302 F. 2d 5 (10th Cir. 1962).... 28

Estes v. Texas, 381 U.S. 532 (1965) 26

Haas v. United States, 344 F. 2d 56 (8th Cir. 1965) 33
Hoffa v. United States, 387 U.S. 231 (1967) 23

Irvin v. Dowd, 366 U.S. 717 (1961) 26

Kansas Electric Supply Company, Inc. v. Dun & Bradstreet, Inc., 448 F. 2d 647 (10th Cir. 1971), cert. den. 405 U.S. 1026 (1972) 33-34
Kastigar v. United States, 406 U.S. 441 (1972) 23
Kolod v. United States, 390 U.S. 136 (1968) 23

Mares v. United States, 383 F. 2d 805 (10th Cir. 1967)..26, 29
Murphy v. Florida, 421 U.S. 794 (1975) 26

National Labor Relations Board v. Carpet, Linoleum and Resilient Tile Layers Local Union No. 419, 213 F. 2d 49 (10th Cir. 1954) 33

O'Callahan v. Parker, 395 U.S. 258 (1969) 30

Pamplin v. Mason, 364 F. 2d 1 (5th Cir. 1966) 26
Pennsylvania v. Mills, 286 A. 2d 638 (Pa. 1971) 30

Rewis v. United States, 401 U.S. 808 (1971).....2, 13, 20, 29
Richards v. United States, 380 U.S. 909 (1965) 33
Rideau v. Louisiana, 373 U.S. 723 (1963) 26, 28

Sheppard v. Maxwell, 384 U.S. 333 (1966) 26-27
Silverthorne v. United States, 400 F. 2d 627 (9th Cir. 1968) 26
Spindler v. United States, 366 F. 2d 678 (9th Cir. 1964), cert. den. sub nom. 33

United States v. Altobella, 442 F. 2d 310 (7th Cir. 1971) 15, 31
United States v. Archer, 486 F. 2d 670 (2nd Cir. 1973).. 15
United States v. Barnes, 383 F. 2d 287 (6th Cir. 1967), cert. den. 389 U.S. 1040 (1968) 17

BLEED THROUGH

United States v. Bear Runner, 502 F. 2d 908 (8th Cir. 1974) 29
United States v. Cantor, 469 F. 2d 435 (3rd Cir. 1972)... 17
United States v. Colabella, 448 F. 2d 1299 (2nd Cir. 1971) 29
United States v. Cox, 449 F. 2d 679 (10 Cir. 1971), cert. den. 406 U.S. 934 (1972) 33
United States v. Donaway, 447 F. 2d 940 (9th Cir. 1971) 17
United States v. Honeycutt, 311 F. 2d 660 (4th Cir. 1962) 17
United States v. Huss, 482 F. 2d 38 (2nd Cir. 1973)...23, 24
United States v. Johns, 444 F. 2d 58 (5th Cir. 1971)..... 17
United States v. McCormick, 442 F. 2d 316 (7th Cir. 1971) 15, 16
United States v. Moia, 251 F. 2d 255 (2nd Cir. 1958)... 33
United States v. Presley, 478 F. 2d 163 (6th Cir. 1973).. 17
United States v. Smaldone, 485 F. 2d 1333 (10th Cir. 1973), cert. den. 416 U.S. 936 (1974) 18
United States v. Turner, 423 F. 2d 481 (7th Cir. 1970), cert. den. 398 U.S. 967 (1970) 33
Waller v. Florida, 397 U.S. 387 (1970) 29

Statutes

18 U.S.C. Sect. 1952 .....2, 3, 4, 6, 7, 12, 13, 18
18 U.S.C. Sect. 3504 .....3, 5, 25, 26

Miscellaneous

Federal Rules of Evidence 901(b)5 and 901(b)(6) 33

Constitutioal

4th Amendment 3
5th Amendment 4, 30
14th Amendment 30

BLEED THROUGH

IN THE

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OCTOBER TERM, 1975

No. .....

PAUL CLYDE VILLANO and PAULINE SMALDONE,
Petitioners,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Tenth Circuit

Paul Clyde Villano and Pauline Smaldone, your petitioners, respectfully pray that a writ of certiorari be issued to review the judgments of the United States Court of Appeals for the Tenth Circuit entered in the above entitled cause on January 8, 1976.

OPINIONS BELOW

This cause was decided by a panel of the United States Court of Appeals for the Tenth Circuit on January 8, 1976, in an opinion which has not yet been officially reported. (Excerpts

appear at 18 CrL 2381.) The opinion is reproduced as Appendix A hereto.

On February 17, 1976, the Court of Appeals denied petitioners' petition for rehearing and suggestion of appropriateness of rehearing in banc. (See Appendix D.) No opinion was written, and the order has not been officially reported.

JURISDICTION

The judgments of the United States Court of Appeals were entered on January 8, 1976. (See Appendix B and C.) A timely petition for rehearing with suggestions of appropriateness of rehearing in banc was denied on February 17, 1976. (See Appendix D.)

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I

Whether, in the light of *Rewis v. United States*, 401 U.S. 808 (1971), there was an insufficiency of evidence to prove a violation of the Travel Act (18 U.S.C. § 1952).

II

Whether the prosecution's evidence was tainted by admittedly illegal electronic surveillance, including the questions of

A. Whether there was a proper taint hearing under *Alderman v. United States*, 394 U.S. 165 (1969),

BLEED THROUGH

B. Whether petitioners were entitled to inspect airtels and other documents related to the wiretaps, and

C. Whether 18 U.S.C. § 3504 may constitutionally impose a statute of limitations on hearings to determine taint.

III

Whether prejudicial pre-trial publicity, as demonstrated by a public opinion survey and the voir dire examination, required a transfer of the cause to another forum for trial.

IV

Whether petitioners were subjected to double jeopardy in this prosecution for gambling violations under 18 U.S.C. § 1952 after having been previously convicted of state gambling offenses involving concurrent dates.

V

Whether evidence of telephone conversations was properly admitted without adequate foundation and identification of petitioners' voices.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States

Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,

shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statutes of the United States

Title 18, United States Code

§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

BLEED THROUGH

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury.

§ 3504. Litigation concerning sources of evidence

(a) In any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, or other authority of the United States—

(1) upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act;

(2) disclosure of information for a determination if evidence is inadmissible because it is the primary product of an unlawful act occurring prior to June 19, 1968, or because it was obtained by the exploitation of an unlawful act occurring prior to June 19, 1968, shall not be required unless such information may be relevant to a pending claim of such inadmissibility; and

(3) no claim shall be considered that evidence of an event is inadmissible on the ground that such evidence was obtained by the exploitation of an unlawful act occurring prior to June 19, 1968, if such event occurred more than five years after such allegedly unlawful act.

(b) As used in this section "unlawful act" means any act the use of any electronic, mechanical, or other device (as defined in section 2510(5) of this title) in violation of the Constitution or laws of the United States or any regulation or standard promulgated pursuant thereto.

STATEMENT

Petitioners, Paul Clyde Villano and Pauline Smaldone, were convicted on all counts of a three-count indictment alleging violations of Title 18, United States Code, Sections 1952 and 2 (R IX 1-2).* Petitioners were tried jointly. They filed separate notices of appeal (R IX 110, 111), but the appeals were consolidated. They filed a joint brief in the Court of Appeals, which issued a single opinion disposing of their appeals. (See Appendix A.)

The language of each count of the indictment was identical except for the dates. Each count charged that during the period designated "within the State and District of Colorado, Paul Clyde Villano and Pauline Smaldone did use, cause to be used, and aid and abet the using of a communication facility in interstate commerce, that is, the interstate telephone, between Nebraska and Colorado, with intent to promote, manage, es-

* The original record filed in the Court of Appeals and certified to this Court consists of nine separate volumes, of which eight are transcripts of courtroom proceedings and the ninth is the record of pleadings. References to the record (R) in this brief shall be to the volume (in Roman numeral) and the page (in Arabic numeral).

BLEED THROUGH

tablish, carry on and facilitate the promotion, management, establishment and carrying on of an unlawful activity, said unlawful activity being a business enterprise involving gambling in violation of Chapter 40, Article 10, Sections 7, 8 and 9, Colorado Revised Statutes 1963, as then amended, and thereafter Paul Clyde Villano and Pauline Smaldone did perform, cause to be performed, and aid and abet the performance of acts to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of said unlawful activity, all of the foregoing in violation of Title 18, United States Code, Sections 1952 and 2".

Count I charged an offense "during the period from on or about the 1st day of November, 1970, to on or about the 31st day of December, 1970." Count II covered the month of January, 1971, and Count III covered the month of February, 1971. The indictment was filed on January 11, 1974 (R IX 1).

After rulings on various pre-trial motions, some of which are relevant to the issues raised in this petition and will be discussed more fully in the Reasons section of this petition, trial commenced on May 6, 1974, in the United States District Court for the District of Colorado at Denver, the Hon. Alfred A. Arraj presiding. After the jury was impaneled and sworn (R V 91), testimony began and was concluded on May 7, 1974. (See Volumes V and VI of the Record.) Final arguments were presented on May 8, 1974 (R VII 404-451), followed by the Court's instructions (R VII 451-463); the verdict of the jury was returned on May 8, 1974 (R VII 469-470, R IX 86, 87).

The only evidence came from witnesses and exhibits produced by the prosecution, except for petitioners' Exhibit A, a calendar of dates in 1970 and 1971. Neither petitioner offered any evidence. The evidence in behalf of the prosecution tended to show the following:

Frank Carlo Amato, at the suggestion and direction of a person unknown to him, operated several telephones in Denver,

Colorado, over which he received betting information and bets on sporting events in November and December of 1970 and January of 1971 (R V 142, R VI 245-247). Upon the receipt of bets by him from various customers whose identities he did not know and who used code numbers, he relayed the betting information by telephone to two women, one of whom he identified as petitioner Pauline Smaldone (R V 143-144, 146-147). (His ability to identify her voice is an issue raised in this petition, and the evidence with reference thereto is more fully developed in Question V.) He did not testify to any dealings with petitioner Paul Villano, and the man who contacted him about setting up the phone operation and who paid him weekly was not Mr. Villano (R V 245-247). When he was arrested three times on gambling charges during this time, his bond was signed by a bondsman who had been contacted by petitioner Villano, and he was represented by attorney Norbont (R V 148-149, R VI 302-304, 373).

Richard Colgan operated a similar telephone in Denver over which he received bets and discussed betting information (R V 154, 156-157). He had been recruited for his activities by petitioner Villano (R V 154). He relayed his betting information to a telephone number listed in the name of Mrs. Smaldone's husband for their daughter (R V 154-155, R VI 282). He called the woman who answered "Pauline", but he testified that he had never met petitioner Pauline Smaldone (R VI 161, 177). (See Question V of this petition for the evidence as to his testimony on the issue of voice identification.) Colgan's compensation and reimbursement for expenses were paid to him on a regular basis by petitioner Villano (R V 155, 178). Colgan also was arrested and represented by attorney Norbont, but he did not know who paid the attorney or bond fees (R V 155-156).

Fud Ferris, Jr. was a resident of Valentine, Nebraska, and owned restaurants in Valentine and North Platte, Nebraska (R V 99-100). Telephone company records of Nebraska tele-

BLEED THROUGH

phones to which he had access indicated that station-to-station long-distance calls were made during the period involved in the indictment to telephone numbers operated by Amato and Colgan (R V 113-114, 216-217, 222-223). Ferris testified that he made the calls and placed bets under the code number X-15 (R V 100-102, 125-126). Colgan did not recall a code number X-15 (R V 172). Amato recalled such a number but thought it was at a later time after the indictment period; he did not know the identity of X-15 or where the calls were from and never heard the name Fud Ferris (R V 149, R VI 239-245). Ferris placed bets in these telephone calls, but he did not know either Amato or Colgan (R V 108). On two occasions he traveled to Denver on other matters and while there he was paid his betting winnings, but he could not identify petitioner Villano as the man who paid him (R V 104, 120). He never paid any money because he always won until the end, and he did not pay his losses (R V 103, 107, 121).

Ferris was not specific as to the dates of his telephone calls except as reflected on the telephone records. Although they indicated calls in the fall of 1970 and the early part of 1971, his testimony seemed to indicate that his bets were a year earlier, relating particularly to the Super Bowl football game in January, 1970 (R V 129-136).

There was no evidence that Ferris ever told Amato or Colgan that he was calling from out-of-state. Amato testified that he could not tell whether the calls were local or long-distance (R V 152-153), and Colgan testified that he did not know there were any long-distance calls and assumed that all were local (R V 175-176). Colgan never told Villano that he got any calls from Nebraska or that anyone was coming from out-of-town, and he testified that Villano did not want to hear about anything other than Denver (R V 179). Colgan never placed any long-distance calls himself (R V 172). There was no testimony that Colgan or Amato ever told the woman to whom they relayed bets that they had received any from out-of-state.

Other evidence consisted of records of telephone numbers to which Mrs. Smaldone may have had access (Pl. Exh. 4), corroboration by neighbors of Colgan that he occupied an apartment and that he apparently took bets (R V 194-196, 199), evidence that Villano received bets from persons in Denver (R VI 331-334, 347-354), corroboration that Fud Ferris had access to telephones with calls between Nebraska and Colorado (R VI 315-316, 320-321), and other corroborative evidence by FBI agents, telephone company employees, and local police.

At the close of the prosecution's case, petitioners' motions for judgment of acquittal were overruled (R IX 70, 71, R VI 374-390). Petitioners offered no evidence and filed further motions for judgment of acquittal at the close of the entire case (R IX 72, 73) which were overruled (R VI 399). The cause was submitted to the jury on all three counts, and the jury returned a verdict finding each petitioner guilty on all counts (R IX 86, 87, R VII 469-470).

Petitioners filed a joint motion for judgment in accordance with motions for acquittal or motion for new trial (R IX 88-92). After a hearing on May 23, 1974, the motion was overruled (R VIII 23). Thereafter, they were sentenced on June 7, 1974 (R IX 106-109).

Petitioner Villano was sentenced to a tern of imprisonment for a period of one year and one day on each count, the sentences on Counts II and III to run concurrently with the sentence on Count I. In addition, he was fined the sum of $750.00 on each count, for a total fine of $2,250.00.

As to petitioner Smaldone, the imposition of her sentence was suspended, and she was placed on probation for a period of two years as to each count, to run concurrently. In addition, she was fined the sum of $750.00 on each count, for a total of $2,250.00.

BLEED THROUGH

Each petitioner duly filed a notice of appeal to the United States Court of Appeals for the Tenth Circuit (R IX 110, 111), and they have remained at liberty on bond pending appeal and pending this petition. On January 8, 1976, a panel of the Court of Appeals filed an opinion (Appendix A) affirming the convictions. Petitioners' timely petition for rehearing and suggestion of appropriateness of rehearing in banc was denied on February 17, 1976 (See Appendix D.)

This joint petition for a writ of certiorari seeks to review the judgments of the Court of Appeals affirming petitioners' convictions.

REASONS FOR GRANTING THE WRIT

I

Sufficiency of the Evidence

The evidence in this case was insufficient to show that either petitioner had violated the Travel Act (18 U.S.C. § 1952). The cause should not have been submitted to the jury, and petitioners' motions for judgment of acquittal should have been sustained (R IX 70-73).

Although there was evidence that Amato and Colgan operated telephones over which they received and relayed bets, the only evidence of long-distance calls, aside from telephone company records, was the testimony of Fud Ferris, and he related the calls to a period of time one year before the indictment period. But even assuming that there was sufficient evidence of the use of an interstate facility, nevertheless we believe that this was not sufficient to establish Travel Act violations by either petitioner.

There was no evidence that petitioner Villano had any connection with the Amato operation, except that he called a bondsman in behalf of Amato, and the bondsman testified that this was not unusual (R VI 304). Amato in fact negated any connection of petitioner Villano, for he was recruited and paid by someone else (R V 245-247). (We admit that there was evidence of petitioner Villano's connection with the Colgan operation, although, as discussed herein, there was no evidence of other essential elements of a Travel Act violation.)

As to Mrs. Smaldone, there was no evidence of her connection with either the Amato or Colgan operations, aside from their opinion evidence as to her voice identification and telephone contacts. See Question V of this petition as to the issue of voice identification.

BLEED THROUGH

But even if it can be said that there was sufficient proof of petitioners' connections with the Amato or Colgan operations, we still believe that under the existing law, especially *Rewis v. United States*, 401 U.S. 808 (1971), no submissible case was made against either petitioner. The best that can be said of the prosecution evidence is that Amato and Colgan received and relayed bets by telephone in violation of Colorado law. They apparently assumed that all of the bettors were from the Denver area (R V 152-153, 175-176). There was no evidence to the contrary except that Fud Ferris apparently made a few calls from Nebraska to Colorado. Thus the evidence was of a local gambling business, patronized sporadically by one non-resident. *Rewis* holds that this does not constitute a federal violation.

In *Rewis*, this Court discussed the effect of the casual interstate bettor and held that no violation of the letter or spirit of the Travel Act was involved. There bettors crossed the state line to participate in the defendants' illegal lottery enterprise. Admittedly, the gambling operation violated Florida law just as, for purposes of this argument, we will concede that the Amato and Colgan operations violated the laws of Colorado. Nevertheless, the fact that bettors came from Georgia to Florida did not make the case a federal offense. If we equate interstate travel with use of interstate facilities, as § 1952 does, then there is no distinction between the *Rewis* case and the instant case.

After holding that Congress did not intend interstate travel by mere customers should be within the Congressional intent of the Travel Act, this Court in *Rewis* stated in language which is particularly appropriate to the facts of the instant case when interpolated as we have taken the liberty of doing by parenthetical changes (l.c. 811-812):

> "But we are unable to conclude that conducting a gambling operation (called) by out-of-state bettors, by itself,

violates the Act. Section 1952 prohibits (use of interstate facilities) with the intent to 'promote, manage, establish, carry on or facilitate' certain kinds of illegal activity; and the ordinary meaning of this language suggests that the (caller's) purpose must involve more than the desire to patronize the illegal activity. Legislative history of the Act is limited, but does reveal that § 1952 was aimed primarily at organized crime and, more specifically, at persons who reside in one State while operating or managing illegal activities located in another.* In addition, we are struck by what Congress did not say. Given the ease with which citizens of our Nation are able to (make phone calls) and the existence of many multi-state metropolitan areas, substantial amounts of criminal activity, traditionally subject to state regulation, are (called) by out-of-state customers. In such a context, Congress would certainly recognize that an expansive Travel Act would alter sensitive federal-state relationships, could overextend limited federal police resources, and might well produce situations in which the geographic origin of (phone callers), a matter of happenstance, would transform relatively minor state offenses into federal felonies. It is not for us to weigh the merits of these factors, but the fact that they are not even discussed in the legislative history of § 1952 strongly suggests that Congress did not intend that the Travel Act should apply to criminal activity solely because that activity is at times (called) by persons from another State. In short, neither statutory language nor legislative history supports such a broad ranging interpretation of § 1952. And even if this lack of support were less apparent, ambiguity concerning the ambit of criminal statutes should be

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* Here petitioners were not beyond the reach of Colorado state authorities. As a matter of fact, they were prosecuted by State authorities for offenses occurring at the same time as those alleged in the federal indictment. See Question IV of this petition.

BLEED THROUGH

resolved in favor of lenity, Bell v. United States, 349 U.S. 81, 83 (1955)."

The Court of Appeals attempted to find distinctions with *Rewis* which are not appropriate; even if the evidence could point to a conclusion that "the *defendants* situated their agents where they carried on transactions by using telephones, receiving local and interstate calls," the defendants in *Rewis* certainly situated themselves to receive gambling activity from local and interstate patrons. Aside from the precise nature of the gambling operation, the facts herein cannot be distinguished from those in *Rewis*.

Not only does the opinion below conflict with a decision of this Court, but it is in conflict with decisions of other Circuits, such as those of the Seventh Circuit in *United States v. Altobella*, 442 F. 2d 310 (7th Cir. 1971), and *United States v. McCormick*, 442 F. 2d 316 (7th Cir. 1971). See also *United States v. Archer*, 486 F. 2d 670 (2nd Cir. 1973). The opinion of the Tenth Circuit herein acknowledges that the Seventh Circuit would make "a plausible argument for reversal," but declines to follow *Altobella* and *McCormick*.

In *United States v. Altobella*, 442 F. 2d 310 (7th Cir. 1971), the defendants had extorted money from an out-of-state victim. There was no doubt as to the defendants' knowledge of the interstate activity, because they knew the victim was from out-of-state and that he intended to obtain money by cashing a check on an out-of-state bank, and they participated in cashing the check through out-of-state facilities and dividing the proceeds. However, as Mr. Justice (then Circuit Judge) Stevens stated (l.c. 314, 315):

"To warrant federal intervention we believe the statute requires a more significant use of a facility of interstate commerce in aid of the defendants' unlawful activity than is reflected on this record. Cf., United States v. Hawthorne,

356 F. 2d 740 (4th Cir. 1966), cert. denied 384 U.S. 908, 86 S. Ct. 1344, 16 L. Ed. 2d 360.

* * * * * * * *

"But when both the use of the interstate facility and the subsequent act are as minimal and incidental as in this case, we do not believe a federal crime has been committed."

See also footnote 12 in *Altobella:*

"The government also suggests that the application of the statute is warranted by the fact that appellants' victim was from out of state. That theory, however, is not set forth in the indictment and there was no evidence of a plan to lure out-of-state victims to Chicago, or even that the conspirators intended to select an out-of-town victim. Moreover, the application of the statute on a comparable theory has just been squarely rejected by the Supreme Court. Rewis v. United States, 401 U.S. 808, 91 S. Ct. 1056, 28 L. Ed. 2d 493 (decided April 5, 1971)."

The Travel Act concerns itself with unlawful activity. The intent of Congress is well summarized in 1961 U. S. Code, Congressional and Administrative News, p. 2666:

"The use of the term 'business enterprise' requires that the activity be a continuous course of conduct. Thus, individual or isolated violations would not come within the scope of this bill since they do not constitute a continuous course of conduct so as to be a business enterprise."

This Congressional intent is reflected in the per curiam opinion in *United States v. McCormick*, 442 F. 2d 316, 318 (7th Cir. 1971):

"Here too the activities engaged in by defendant were essentially local. The role played by the interstate mail-

BLEED THROUGH

> ings was '*a matter of happenstance*' and '*minimal and incidental*' to the operation of the illegal lottery. As in *Rewis* and *Altobella*, the interstate activities relied upon by the Government were the *acts of others and were not actively sought or made a part of the illegal activity of the accused*." (Emphasis supplied.)

See also *United States v. Johns*, 444 F. 2d 58 (5th Cir. 1971); *United States v. Donaway*, 447 F. 2d 940 (9th Cir. 1971); *United States v. Cantor*, 469 F. 2d 435 (3rd Cir. 1972), and *United States v. Presley*, 478 F. 2d 163 (6th Cir. 1973).

Finally, in view of the lack of evidence of any knowledge by petitioners that Amato or Colgan were receiving interstate calls, the convictions must be reversed. The opinion below expressly refused to follow *United States v. Barnes*, 383 F. 2d 287 (6th Cir. 1967), cert. den. 389 U.S. 1040 (1968), and *United States v. Honeycutt*, 311 F. 2d 660 (4th Cir. 1962). In *Barnes*, the two defendants worked in a gambling establishment in violation of local law, but there was no evidence that they had anything to do with or any knowledge of a third defendant's out-of-state purchases of supplies, just as petitioners here had nothing to do with or any knowledge of the receipt of the out-of-state information by Amato or Colgan. There is a great deal of significant language in the *Barnes* opinion in the section on discussion of the evidence (pages 290-293 of 383 F. 2d), and we will not lengthen this petition by quoting therefrom. But if the names of Villano and Smaldone are substituted for Carney and Washer, and if the names of Amato and Colgan are substituted for Barnes, and if the act of receiving bets from interstate telephones is substituted for purchasing gambling paraphernalia from out-of-state sources or cashing out-of-state checks, there is a ready-made opinion for the reversal of the convictions of both petitioners herein.

In attempting to distinguish ***Barnes*** **and** ***Honeycutt,*** the opinion seems to find sufficient interstate activity because of speculation that "interstate calls were not unlikely." There was no proof here that anyone had knowledge of any interstate activity, and in fact the testimony of the prosecution witnesses Amato and Colgan was to the opposite (R V 152-153, 175-176).

The opinion herein also approved the following instruction (R VII 456-457):

> "I further instruct you that with respect to each count of the indictment, if you find that a particular defendant did in fact cause to be used or aid and abet the using of a facility in interstate commerce, it does not matter under the law that he may not have known that his actions involved the use of a facility in interstate commerce or that his actions caused or aided and abetted the use of such facility. If that person performed an act with a specific intent to further a business enterprise involving gambling, which enterprise was in violation of the laws of the State of Colorado, he further ran the risk that his actions caused or aided and abetted the use of such facility in interstate commerce."

This instruction was patterned after the "risk" instruction approved in *United States v. Smaldone,* 485 F. 2d 1333, 1348 (10th Cir. 1973), cert. den. 416 U.S. 936 (1974). But that case involved 18 U.S.C. § 1955, which, although relating to local gambling, is a distinct and separate statute from § 1952. Section 1955 has no relationship to interstate activity except that because of the size of the local gambling operation it may become a federal offense. This is quite different from § 1952 which requires a separate affirmative element for federal jurisdiction such as travel or use of an interstate facility. Although it may be proper in a § 1955 case to instruct that a defendant runs the risk that the size of the local operation in and of itself

BLEED THROUGH

brings it within the federal jurisdiction, it should not follow that participation in a local gambling enterprise contemplates that someone else will take affirmative interstate action to invoke federal jurisdiction.

The giving of the instruction was prejudicial because there was no evidence that either petitioner knew that interstate facilities were being used. Neither Amato nor Colgan testified that they knew of interstate calls, and Colgan in fact testified that he made no long-distance calls except to his mother (R V 172). He was not aware of any calls coming from Mr. Ferris from Nebraska (R V 172-173), and he testified that he assumed all the calls were local and he had no way of knowing that they were long-distance (R V 175-176). It would seem from his testimony that his instructions were not to take any calls from out-of-state (R V 179).

The instruction was erroneous in the light of *Rewis*. Although the Florida residents there did not cross the state line, bettors came from Georgia to participate in the illegal Florida lottery. This Court decided that even though there was actually travel in interstate commerce by the Georgia residents, the Florida operators of the lottery did not violate the Travel Act. If the instruction in the instant case were a proper statement of the law, then this Court should have held that the Florida operators "ran the risk" that persons would travel from Georgia to Florida to bet with the lottery. But this Court rejected the ruling of the Court of Appeals upholding the Florida operators' convictions on the grounds that they were responsible for the interstate travel of their customers. In this respect, "responsible" would be similar to "running the risk". This Court also rejected reasonable-foreseeability or active-encouragement tests, both of which would impose a greater prosecutorial burden than the running-the-risk test.

Based upon the *Rewis* case, we believe that the convictions must be reversed for error in giving this instruction.

Because of the conflict of the opinion of the Court of Appeals with the decision of this Court in *Rewis v. United States** and because of the conflict with numerous decisions of other Circuits, we respectfully suggest that certiorari should be granted as to this Question.

II

Illegal Electronic Surveillance

At the pre-trial hearing, Sgt. Mulnix of the Denver Police Department testified that he had supervised the monitoring of telephone conversations which resulted in recordings of each petitioner by local authorities (R II 111). Although he had no recollection of turning the transcripts over to federal agents (R II 116), he did acknowledge that he read all the transcripts, discussed petitioners with the federal agents in charge of this investigation, and told the agents that there were wiretaps (R II 116-117). One series of wiretaps took place in February, 1971, during the indictment period herein, and at a time when the federal investigation of petitioners began. Although Sgt. Mulnix could not recall at the hearing any documents that he had turned over to the FBI,** Agent Malone acknowledged that documents were transmitted, including a written summary of the local cases. (See Defendants' Exh. G, R III 137).

Agent Malone, the case agent here, frequently received evidence of bookmaking activities of these petitionrs from the local authorities. He acknowledged that he read the entire summary of the local cases, including references to wiretapping, after the investigation of petitioners had started in his office and the finger

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* The conflict with *Rewis* is so clear that summary per curiam reversal would be appropriate.

** It seems that he purposely did not review the file or documents in order to be vague in his testimony.

BLEED THROUGH

of suspicion had pointed at petitioners (R III 138-140, 160). He discussed the matter with Sgt. Mulnix, who he assumed had listened to the tape recordings or had seen the transcripts (R III 140). He also received information concerning state wiretaps in 1972. (See Defendants' Exh. H, R III 173).

Although Agents Malone and Bush each testified that the information for the federal charge against petitioners did not come from wiretaps but from sources in Nebraska, it cannot be denied that they had information concerning the existence and contents of wiretaps. They could not put out of their minds all information received from the local authorities emanating from the wiretaps. Under these circumstances, we believe the evidence of taint was shown and that the prosecution failed to meet its burden to negate the taint.

At the hearing, petitioners requested an opportunity to examine the airtels connected with this case so as to trace all of the sources and transmittals of information; they were produced for *in camera* inspection and determination of relevancy by the Court, but defense counsel was denied access (R III 145). Later the airtels were furnished to the Court (R III 165-166), who examined them (while other proceedings continued). The Court decided they were not relevant, but preserved them for appellate review (R III 237). Neither petitioners nor their counsel have ever seen them.

We believe it would be appropriate at this point to clarify what issues are and are not involved here. There is no issue as to whether petitioners were subjected to surveillance, because that has been admitted. There is no issue as to revealing the contents of the wiretaps, because petitioners have received copies of the transcripts. There is no issue as to the legality of the wiretaps, because their illegality has been admitted (R II 120). The basic issues presented by this appeal are whether the proceedings were tainted by the illegal surveillance and whether petitioners were entitled to inspect the airtels and other documents in connection

with the taint hearing. (A third issue as to illegal surveillance in 1964 is also discussed herein.)

Under *Alderman v. United States*, 394 U.S. 165 (1969), the action of the District Court in denying access to the airtels was erroneous. There the government argued that the records of wiretaps need only be submitted to the trial court for a determination as to whether they are arguably relevant. This Court rejected the argument, holding that only the defense can make that determination, for "the task is too complex, and the margin for error too great, to rely wholly on the *in camera* judgment of the trial court to identify those records which might have contributed to the Government's case." (394 U.S. at 182).

Alderman went on to say that the government has the ultimate burden of persuasion to show that the evidence is untainted, but that the defendant must go forward with specific evidence demonstrating taint. Here the taint was demonstrated by the testimony that the FBI case agent knew of the existence of the wiretaps and received reports on them from the local authorities. The mere assertion by the government that their case was not infected and the uncorroborated statement that they had an independent source, without a probing examination of the independent source, is contrary to *Alderman*, where it is said (l.c. 183-184):

> "With this task ahead of them, and if the hearings are to be more than a formality and petitioners not left entirely to reliance on government testimony, there should be turned over to them the records of those overheard conversations which the Government was not entitled to use in building its case against them. . . .
>
> "Adversary proceedings will not magically eliminate all error, but they will substantially reduce its incidence by guarding against the possibility that the trial judge, through lack of time or unfamiliarity with the information con-

BLEED THROUGH

tained in and suggested by the materials, will be unable to provide the scrutiny which the Fourth Amendment exclusionary rule demands."

We believe that the *in camera* examination of the airtels by the Court was not satisfactory. The defense should have been permitted to examine them and to proceed with the evidence to show where the case was tainted.* The *Alderman* case should not be limited just to a revelation of the recordings themselves, but the rationale of *Alderman* should be applied equally to the fruits of the recordings. Only the defense could adequately probe the poison that developed from the recordings to affect the further investigation by agents armed with the fruits of the poisonous tree. See also *Hoffa v. United States*, 387 U.S. 231 (1967), and *Kolod v. United States*, 390 U.S. 136 (1968). Compare *Kastigar v. United States*, 406 U.S. 441, 459-462 (1972).

The government here failed in its ultimate burden of showing freedom from taint because its only evidence was the uncorroborated statement by Agent Malone that he had an independent source from a deceased Nebraska agent (R III 132) and from an unidentified informant (R III 178-180). (Of course, petitioners had ample evidence demonstrating taint through the passage of information from the Denver police officer who supervised the illegal surveillance to the FBI case agent.) The government should have been required to produce concrete evidence in court, subject to cross-examination and the penalties of perjury—not just an assumption or opinion on the part of the agent—which would meet the government's burden of persuasion.

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* In *United States v. Huss*, 482 F. 2d 38, 47 (2nd Cir. 1973), the Court stated: "To compel a party who objects to the use of evidence obtained as a result of unlawful wiretapping to go forward with a showing of taint, Alderman v. United States, supra, 394 U.S. at 183, 89 S.Ct. 961, and then to withhold from him the means or tools to meet that burden, is to create an absurdity in the law."

In *United States v. Huss*, 482 F. 2d 38, 48-50 (2nd Cir. 1973), the Court was compelled "to strictly scrutinize the government's claim of independent source" and, in holding that the mere statement that they had an independent source was not sufficient, said:

> "The teaching of the Supreme Court in Alderman v. United States, *supra*, cannot be avoided. We are instructed that when illegal electronic surveillance has come to light it is the adversary system, *not representations by the government and not in camera decisions by the court*, which must be relied upon to determine whether overheard matter is 'relevant' to the taint hearing." (Emphasis supplied.)

We believe that the Court of Appeals opinion herein is in conflict with this Court's opinion in *Alderman* and the Second Circuit's opinion in *Huss*. Petitioners' contention has been rejected because they could not disprove the government's denial of taint, but petitioners were deprived of access to the means by which they could have explored the government's denial. We believe that the Court of Appeals has erroneously limited *Alderman* by suggesting that the only documents that are required to be furnished to the defense are the transcripts of monitored conversations and not airtels or other records relevant to the taint issue.

* * * * * * *

Another issue of illegal electronic surveillance appeared on the day trial commenced, when the government for the first time revealed that there had been illegal electronic activity in 1964. In February a pen register was followed by monitoring and recording of calls of Mr. Villano (R V 5-7). In December, 1964, there was a surreptitious recording of a conversation with Mr. Villano (R V 7-8).

It was the position of the government (R V 8) that these surveillances were not required to be disclosed because of 18

BLEED THROUGH

U.S.C. § 3504, which has established an arbitrary five-year statute of limitations for determining taint. Petitioners believe (R V 6) that no statute of limitations can circumvent taint when it does exist and that constitutional rights cannot arbitrarily be denied by the mere passage of time.

Furthermore, here Agent Malone testified that he talked to Sgt Mulnix about petitioners since 1968 (R III 133), that he knew that Mr. Villano "was involved in gambling activities . . . for years" (R III 141-142), and that he had gotten information that both petitioners were involved in gambling in the early sixties which he corroborated and substantiated in the early part of 1968 (R III 142). It was this information which he used as background for the investigation of the instant case. Even if the statute of limitations of § 3504 is valid, the 1964 information was no doubt used by the agent all during the limitation period to infect and taint the investigation which he conducted for the alleged offenses in 1970 and 1971. Such use of the information should toll the statute of limitations.

We submit that the purpose of § 3504, if constitutional, was to avoid hearings on the question of the taint of illegal electronic surveillance where a defendant was surveilled many years previously on completely unrelated matters. But where the persons and matters subject to surveillance are the same as those under investigation and where the information is part of the background being utilized by the investigating agent, then no arbitrary statute of limitations can deprive a defendant of his Fourth Amendment rights.

* * * * * * *

This case presents important issues regarding electronic surveillance which should be decided by this Court. Whether it is to examine the limitations on the applicability of *Alderman* or to review the conflicts with other Circuits which have decided

cases similar to *Huss* or to determine the constitutionality and applicability of 18 U.S.C. § 3504, we respectfully suggest that certiorari should be granted as to this Question.

III

Prejudicial Publicity*

The name "Smaldone" has engendered a tremendous amount of publicity over the years in the Denver area; the name "Villano" is also well known. Therefore petitioners, believing that they could not obtain an impartial jury in the Denver area, requested a transfer of the cause to another area (R IX 9), but the motion was overruled (R III 240). The existence and effect of such publicity was proved at the pre-trial hearing; its prejudicial impact was demonstrated when the jury was impaneled.

Pre-trial publicity which affects, or which may possibly have an effect upon, the fairness of a trial constitutes a deprivation of due process of law. *Sheppard v. Maxwell*, 384 U.S 333 (1966); *Estes v. Texas*, 381 U.S. 532 (1965), *Rideau v. Louisiana*, 373 U.S. 723 (1963), *Irvin v. Dowd*, 366 U.S. 717 (1961); *Chapman v. California*, 386 U.S. 18, 43-44 (1967) (Stewart, J., concurring). Compare *Murphy v. Florida*, 421 U.S. 794 (1975). Whenever it appears that prejudicial matter has been publicized in the news media, it is presumed that it has come to the attention of the jury, and that the defendant has been prejudiced; the trial cannot proceed unless the Court is satisfied to the contrary. *Mares v. United States*, 383 F. 2d 805, 808-809 (10th Cir. 1967), *Pamplin v. Mason*, 364 F. 2d 1 (5th Cir. 1966), *Silverthorne v. United States*, 400 F. 2d 627,

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* This issue was presented for review to the Court of Appeals, but in the last paragraph of the opinion, the denial of a change of venue was rejected, without discussion, as a point of "no substance". In so deciding, we believe the Court of Appeals failed to follow numerous decisions of this Court.

BLEED THROUGH

644 (9th Cir. 1968). Cf. *Baker v. Hudspeth*, 129 F. 2d 779, 781-782 (10th Cir. 1942).

The extent of the prejudicial publicity here was demonstrated by the evidence presented at the pre-trial hearing on March 29, 1974 (R II). Various representatives of the news media testified to substantial coverage of the Smaldone family and Mr. Villano, over many years, which was heightened within the year before trial by a shooting of Mrs. Smaldone and the bombing of her house just a few days before indictment.

The effect of this publicity was shown initially by the report of a public opinion survey company—Defendants' Exhibit C introduced at the March 29 hearing. From the results of that survey, it is obvious that the Smaldone and Villano names are almost exclusively associated with crime, gambling and violence. Although the results of the survey were not as severe as those of a prior survey (Defendants' Exhibit E), it is obvious that substantial prejudicial name association still existed shortly before trial. Thus, petitioners entered the courtroom, as suggested by an offer of proof (R II 94), with a large percentage of prospective jurors already prejudiced against them.

That the results of the survey were accurate was proved by the voir dire examination of jurors at the commencement of the trial. 85 prospective jurors were called (R V 19-25); two were immediately excused for personal reasons (R V 27, 29); of the 83 remaining, 17 had heard or read about the case (R V 32-40), and 31 more heard or read something concerning petitioners (R V 41-46). Thus, 48 out of 81,* or 59%, acknowledged having some prior information about the case or petitioners. The Court excused all of these persons for cause (R V 46-48).

That a sufficiently large number of persons was called so that some did not acknowledge an acquaintance with petitioners

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* Two prospective jurors seem to have gotten lost somewhere, because only 33 remained for the final panel (R V 48, 56).

or the case does not avoid the impact of this issue. Among thousands of prospective jurors, doubtless some will always be found who would deny any knowledge of the case, and a transfer for prejudicial pre-trial publicity would never be necessary. But is it proper to have a jury consisting only of those who never have been exposed to the general news media? Such a jury would be less of a cross-section of the community and more of a singular class of persons quarantined from the press. Here it would have been much simpler for the Court to have transferred the cause to another forum where the community would have been less exposed to the harmful publicity and where a true cross-section of that community could have been available. As said in *Rideau v. Louisiana*, supra, 373 U.S. at 727, "due process of law in this case required a trial before a jury drawn from a community of people who had not" been exposed to the publicity.* Cf. *Dennis v. United States*, 302 F. 2d 5, 7-8 (10th Cir. 1962).

Had a transfer of this cause been granted, there would have been no incidents such as the statement by one prospective juror that he had heard the names and about "Mrs. Smaldone, the bombing of her house" (R V 41), and the sinister implications of another answer that "I have heard the name and also other activities of the family" (R V 44). Both of these incidents were called to the attention of the Court with requests for a mistrial and discharge of the entire panel, but the requests were denied (R V 41, 47). At the very least, the Court could have avoided these problems by granting petitioners' request for a separate voir dire of each juror (R IX 62-63, R V 4). See

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* It is interesting that there were acquittals in two prior cases of members of the Smaldone family when the trial was transferred, but in two others and now in the instant case in which transfers were not granted, convictions resulted (R II 105-106). We are not suggesting that a defendant is entitled to a change just because he stands a better chance of an acquittal elsewhere, but, on the other hand, he should not be denied a change for that reason. All we request is that a cross-section of prospective jurors be available who have not been subjected to the influences of prejudicial publicity.

BLEED THROUGH

Mares v. United States, 383 F. 2d 805, 809 (10th Cir. 1967), *United States v. Colabella*, 448 F. 2d 1299, 1303-1304 (2nd Cir. 1971), and American Bar Association, Standards Relating to Fair Trial and Free Press, Section 3.4(a). Compare *United States v. Bear Runner*, 502 F. 2d 908 (8th Cir. 1974).

Based upon the pre-trial evidence and the facts developed during the impaneling of the jury, no jury was or could be obtained in the Denver area which would be free of prejudicial publicity. Because of the denial of a fair trial to petitioners and because of the conflicts with decisions of this Court, we respectfully suggest that certiorari should be granted as to this Question.

IV

Double Jeopardy (Prior State Charges)

Evidence at the pre-trial hearing on April 4, 1974 (R III 216, R IX 42-55) showed that each petitioner was charged, convicted and punished in Colorado state courts for gambling violations during the same continuous period of time involved in this federal indictment.* We believe that a second federal trial is barred by the Fifth Amendment prohibition against any person being "subject for the same offence to be twice put in jeopardy of life or limb".

Decisions of this Court seem to reject the dual prosecution created by this case. In *Waller v. Florida*, 397 U.S. 387, 396 (1970), there is an apparent withdrawal from earlier cases which, under the dual sovereignty doctrine, permitted successive

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* The state convictions demonstrate that there was no need for federal prosecution because obviously state authorities were not hampered in their prosecution by any interstate activities. Thus this case is not really within the intent of the Travel Act which, according to its legislative history, was aimed at organized criminal activity not subject to state prosecution because of the interstate network. See *Rewis v. United States*, 401 U.S. 808 (1971).

prosecutions by federal and state governments. This Court held that the defendant "could not lawfully be tried both by the municipal government and by the State of Florida. In this context a 'dual sovereignty' theory is an anachronism, and the second trial constituted double jeopardy violative of the Fifth and Fourteenth Amendments to the United States Constitution." The companion case of *Ashe v. Swenson*, 397 U.S. 436 (1970), lends further support to our position against division of prosecutions for the same alleged offense. See the concurrence of Mr. Justice Black (397 U.S. at 447):

> "On several occasions I have stated my view that the Double Jeopardy Clause bars a State or the Federal Government *or the two together* from subjecting a defendant to the hazards of trial and possible conviction more than once for the same alleged offense. (Cases cited.)" (Emphasis supplied.)

Compare *O'Callahan v. Parker*, 395 U.S. 258 (1969), where a court-martial was denied concurrent jurisdiction with a state court to try a soldier for a civilian-type offense.

In *Pennsylvania v. Mills*, 286 A. 2d 638, 641 (Pa. 1971), the Supreme Court of Pennsylvania discusses the dual sovereignty concept and the double jeopardy clause:

> "It appears to us that the only penological justification for permitting a second prosecution and punishment for the same offense even where different sovereigns are involved is out and out punishment, and we certainly hope that at this late date in the history of the development of the penal system of this Commonwealth and the Nation, that incarceration for a criminal act stands on stronger footing than—an eye for an eye."

The basic interest of the federal government under the Travel Act is to be able to stifle those illegal enterprises which, because of interstate activity and non-residency problems, are immune

BLEED THROUGH

from local prosecution. The reason for such rule certainly does not exist in the instant case, because petitioners were not only subject to, but were in fact prosecuted under, state law. Compare *United States v. Altobella*, 442 F. 310, 316 (7th Cir. 1971).

We believe that the opinion below has erroneously restricted this Court's opinion in *Waller* to cases in a state court and a municipal court. Because of the need to clarify the law in this important double jeopardy issue, we respectfully suggest that certiorari should be granted as to this Question.

V

Telephone Voice Identification*

On three separate occasions, the District Court permitted key prosecution witnesses to testify that they had telephone conversations with a defendant without adequate foundation being laid as to the ability of the witness to identify the voice:

1. Fud Ferris claimed that after his betting ceased he had a telephone conversation with petitioner Villano in which Ferris told him that the FBI had contacted him and Villano told him not to worry and that the FBI did not know anything (R V 110-112). But there was nothing in the testimony of Ferris to show that he had any prior phone conversations with Villano or that there was any basis for him to know that it was the telephone voice of Villano. In fact, he was unable to identify Villano in court (R V 104).

2. Amato testified that he was 99% sure that the woman to whom he relayed bets was Mrs. Smaldone (R V 146-147),

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* This issue also was rejected by the Court of Appeals, without discussion, as being of "no substance". It is an important issue, for without this evidence there was absolutely no case against Mrs. Smaldone.

but he acknowledged that on five occasions he testified before the grand jury that he "thought" or "assumed" it was she (R V 254-257). His identification was based on two personal contacts with Mrs. Smaldone. The first occasion was on Christmas Eve when he was drinking heavily and, according to his words was "paralyzed and drunk" (R VI 259-260). He admitted that he was unable to drive and that "things were a little shaky" (R VI 260). Because of his condition and the fact that there was obviously no conversation from which he could become familiar with her voice, his identification could not be based on this first meeting. The second contact took place after he had been arrested. He visited the Smaldone house for about five minutes and, aside from greeting Mrs. Smaldone, he had no conversation with her and stayed in another room while she talked to her husband (R VI 261-263). He then attempted to bolster his testimony by saying that they discussed his earlier arrests (R VI 264-265), but his testimony was vague and if the discussion did take place, it was obvious that Mrs. Smaldone was unaware of the prior arrests—she asked him what he had been arrested for (R VI 264). Had she been the relay person, she certainly would have known of the arrests. On redirect examination, it was suggested to him that there may have been more contacts with Mrs. Smaldone (R VI 265), but his grand jury testimony corroborated that he had only two personal contacts with her (R VI 272). Thus there was no basis for his identification of Mrs. Smaldone's voice.

3. Colgan testified that he relayed bets to a woman at a telephone number (R VI 154-155) which the evidence showed was listed in the name of Mrs. Smaldone's husband for their daughter (R VI 282, Pl. Exh. 4). He testified that he called the woman Pauline, but that he had never met petitioner Pauline Smaldone before trial (R V 161, 177). And he acknowledged that everyone in the gambling operation, including himself, used fictitious names and he assumed that the name Pauline was fictitious (R V 167-170). He obviously had no foundation from which he

BLEED THROUGH

could testify that the party with whom he spoke was petitioner Smaldone.

Under the applicable law, the testimony did not establish a proper foundation for the reception of the evidence of these phone conversations. None of the witnesses was qualified to express an opinion as to the identity of the persons on the telephone.

The question of the admissibility of opinions as to identity of telephone callers has often been of concern to courts, but in every case where such testimony is accepted, there has been substantially more evidence than here of the foundation for the witnesses to identify the persons on the other end of the telephone. No case has permitted identification on such weak credentials as these witnesses possessed. Compare Federal Rules of Evidence 901(b)5 and 901(b)(6).

This is not a case where the witness had adequate opportunity to become familiar with the voice before the call [cf. *United States v. Turner*, 423 F. 2d 481, 484 (7th Cir. 1970), cert. den. 398 U.S. 967 (1970), and *National Labor Relations Board v. Carpet, Linoleum and Resilient Tile Layers Local Union No. 419*, 213 F. 2d 9 (10th Cir. 1954)], or where the witness acquired his knowledge by adequate contact after the call [cf. *United States v. Cox*, 449 F. 2d 679, 690 (10th Cir. 1971), cert. den. 406 U.S. 934 (1972)], or where the defendant personally acknowledged the call afterwards [cf. *United States v. Moia*, 251 F. 2d 255, 257 (2nd Cir. 1958)], or where the person identified was the only one having knowledge of the subject matter of the conversation [cf. *Haas v. United States*, 344 F. 2d 56, 63 (8th Cir. 1965)], or where there was other circumstantial evidence pointing to the identity of the caller [cf. *Cwach v. United States*, 212 F. 2d 520, 525 (8th Cir. 1954), *Spindler v. United States*, 366 F. 2d 678, 681 (9th Cir. 1964), cert. den. sub nom. *Richards v. United States*, 380 U.S. 909 (1965), and *Kansas Electric Supply Company, Inc. v. Dun &*

Bradstreet, Inc., 448 F. 2d 647, 650-651 (10th Cir. 1971), cert. den. 405 U.S. 1026 (1972)].

Based upon all of the authorities, we believe it is clear that none of the witnesses in the instant case was properly qualified to express the opinion that the person with whom he was speaking was a defendant. There was no foundation laid for such evidence, and it should not have been admitted. By the admission of such evidence, without which it is unlikely that there would have been any convictions, and certainly not against Mrs. Smaldone, the courts below have totally disregarded and ignored numerous decisions of other circuits which have established guidelines for the admissibility of telephone conversations.

Because of this conflict with other circuits, we respectfully suggest that certiorari should be granted as to this Question.

CONCLUSION

For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A

OPINION OF COURT OF APPEALS,
DATED JANUARY 8, 1976

Publish

United States Court of Appeals, Tenth Circuit

Nos. 74-1463 and 74-1464

United States of America,
Plaintiff-Appellee,
v.
Paul Clyde Villano and Pauline Smaldone,
Defendants-Appellants.

Appeal from the United States District Court for the District of Colorado (D.C. No. 74-CR-25)

W. Allen Spurgeon, Assistant United States Attorney, Denver, Colorado (James L. Treece, United States Attorney, and John W. Madden, III, Special Assistant United States Attorney, Denver, Colorado, on the brief) for Plaintiff-Appellee

Irl B. Baris of Newmark and Baris, St. Louis, Missouri (Joseph Saint-Veltri of Davies and Saint-Veltri, Denver, Colorado, on the brief) for Defendants-Appellants

Before Seth, Holloway and Barrett, Circuit Judges

Holloway, Circuit Judge

Defendants Paul Clyde Villano and Pauline Smaldone were convicted on jury verdicts under a three-count indictment, each

count covering one of three time periods, for using, causing to be used, or aiding and abetting the use of a communication facility in interstate commerce, namely the interstate telephone, in violation of 18 USCA §§ 1952 and 2. On appeal defendants raise questions concerning the sufficiency of the evidence, jury instructions, telephone voice identification, division of the charges into multiple counts, double jeopardy, adequacy of the *Alderman* taint hearing, venue and jury selection, the constitutionality of § 1952 (the Travel Act), pre-indictment delay, and denial of severence. We conclude that the convictions should stand, and affirm.

The facts are dealt with in discussing the appellate contentions.

I

Sufficiency of the Evidence

a. The unlawful activity and use of interstate facilities

The three counts in the indictment were identical except for the time periods involved.[1] Count I encompassed the period of

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[1] Each count in the indictment alleged in pertinent part that:

within the State and District of Colorado, Paul Clyde Villano and Pauline Smaldone did use, cause to be used, and aid and abet the using of a communication facility in interstate commerce, that is, the interstate telephone, between Nebraska and Colorado, with intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of an unlawful activity, said unlawful activity being a business enterprise involving gambling in violation of Chapter 40, Article 10, Sections 7, 8 and 9, Colorado Revised Statutes 1963, as then amended, and thereafter, Paul Clyde Villano and Pauline Smaldone did perform, cause to be performed, and aid and abet the performance of acts to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of said unlawful activity, all of the foregoing in violation of Title 18, United States Code, Sections 1952 and 2.

BLEED THROUGH

November and December, 1970; count II covered the month of January, 1971; and count III the month of February, 1971.

Since we are reviewing convictions on guilty verdicts we must view the proof in the light most favorable to the Government. United States v. Pauldino, 443 F.2d 1108, 1110 (10th Cir.), cert. denied, 404 U.S. 882. So viewed there was proof tending to show that Villano and Smaldone were in the bookmaking business during the period from November 1, 1970, through February 28, 1971. Villano handled substantial betting on football and basketball games with Denver residents who testified that he personally handled collections and payoffs (R VI 330, 332-34; 347-48, 350-54).

From November, 1970, through February, 1971, Frank Amato worked as a telephone operator for a Denver bookmaker taking bets and providing line information. Amato worked five or six days a week in this position, serviced 20 to 30 customers by code number, and handled between $5,000 and $7,000 per day. Upon receipt of the bets he relayed them to a woman whose voice he recognized as defendant Pauline Smaldone's.[2] Amato specifically recalled receiving calls from a bettor who identified himself by the code number X-15 (R V 142-45; 147; 150-51). In January, 1971, Amato was arrested by State authorities for gambling violations. Henry Veto, a professional bondsman, testified that after Amato's arrest he provided Amato's bond at the request and expense of Villano (R V 148; R VI 302-03).

During the indictment period Richard Colgan was employed by Villano as a telephone operator. He was paid by Villano in cash on a weekly basis. Colgan testified that he serviced approximately 50 customers and received an average of $25,000 to $35,000 in bets per week. After receiving bets Colgan re-

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[2] Amato testified that the purpose of relaying bets was so that in case of a raid, a phone man would not be caught with betting records (R V 144). Amato also stated that at times he relayed bets to a second woman for about two or three weeks, but he said he relayed most of his bets to Smaldone (R V 145-46).

layed them to a woman known to him as Pauline who received this information at telephone number 237-9254 in Denver (R V 154-55; 160-61). The Government's proof showed this number to be listed to C. M. Smaldone for Claudia Smaldone, 2997 Pearson Way, Denver, Colorado (Pl. Ex. 4). The owner of this residence during the period encompassed by the indictment was defendant Pauline Smaldone (Pl. Ex. 5, 6, 7). If the sports schedules required by Colgan were ever late he would call Pauline's number and they would be sent to him. If a bettor desired to exceed the $2,000 limit on any single bet, he was required to call Pauline and then defendant Villano would call him to either grant or deny him permission to accept the bet (R V 161-62).

The evidence of interstate telephone calls came from Fud Ferris, Jr., a resident of Valentine, Nebraska, who owned restaurants in Valentine and North Platte. He testified that during the fall of 1970 and the spring of 1971, he placed bets with a Denver bookmaker by use of telephone facilities located in the two restaurants, his residence, and the residence of his sister-in-law in North Platte. Ferris said he had three phone numbers that he would call in Denver and that he used code number X-15 when placing all of his bets. Ferris stated, however, that he had never heard of Amato or Colgan. He testified that during the indictment period his highest betting might have been $5,000 in a week, but that there were some weeks he did not place any bets.

Ferris stated he traveled to Denver where he was paid his winnings by a man known to him as Paulie (R V 104, 108).[3] However, in court Ferris was unable to identify defendant Paul Villano as the person who paid him (R V 104). The time and place of payment would be previously arranged during his interstate telephone calls to Denver when he obtained line information and placed bets (R V 100-105). At the conclusion of

[3] During the trial, several witnesses used the nickname "Paulie" when referring to defendant Villano (R V 179,186,192; R VI 365).

BLEED THROUGH

Ferris's betting through the three Denver telephone numbers he owed $4,000 which he did not pay (R V 107-108).

Several of the telephone calls made by Ferris were corroborated by telephone company records. The records, together with the testimony of Ferris, Amato and Colgan, supported an inference that Ferris made numerous interstate telephone calls to numbers operated by Amato and Colgan during the indictment period.[4]

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[4] The records showed calls as follows from the Nebraska phones used by Ferris:

Count I	Nov.-Dec., 1970	3 calls to Amato phones
Count II	January, 1971	7 calls to Amato phones
Count III	February, 1971	6 calls to Colgan phones

Amato testified that he had worked three phone locations during the indictment period: 244-9221 (West Fourth Ave.), 427-2667 (Briarwood Apts.), and 244-9129 (Marion St.) (R VI 268-69). Colgan stated that he had worked one phone location during the same period: 266-9781 (Pearl St.) (R V 157, 195; Pl. Ex. 3). The telephone number at Ferris' North Platte restaurant was 532-5340 (R V 101, 222). Telephone records of this number established the following calls (Pl. Ex. 1):

Date	*Number Called*	*Location*
November 25, 1970	244-9221	(Amato-West Fourth Ave.)
December 21	427-2667	(Amato-Briarwood Apts.)
December 21	427-2667	(Amato-Briarwood Apts.)
January 4, 1971	244-9129	(Amato-Marion St.)
January 6	"	"
January 7	"	"
January 7	"	"
January 7	"	"
January 11	"	"
January 11	"	"
February 2, 1971	266-9781	(Colgan-Pearl St.)
February 2	"	"
February 6	"	"
February 6	"	"
February 6	"	"

The telephone number of Ferris' sister-in-law, in North Platte, Nebraska, was 532-2046 (R V 101, 222; Pl. Ex. 3). Phone records of her telephone showed that Colgan's Pearl Street number had been called on February 2, 1971 (Pl. Ex. 2).

From the proof we are satisfied the jury could find beyond a reasonable doubt that Villano and Smaldone caused the use, or aided and abetted the use, of interstate phone facilities with the intent to promote and carry on and facilitate the promotion and carrying on of an unlawful activity—a business enterprise involving gambling in Colorado—and that they thereafter performed or attempted to perform such acts of promoting and carrying on or of facilitating the promotion and carrying on of unlawful gambling. Thus it appears that the proof supports the convictions for violation of § 1952.

b. **Adequacy of the proof in view of the Rewis decision**

Defendants' argument focuses on Rewis v. United States, 401 U.S. 808. They say that the evidence was only of a local gambling business, patronized sporadically by one non-resident and that *Rewis* holds that this does not constitute a federal offense (Joint Brief for Appellants, at 12). Reliance is placed on *Rewis*, on United States v. Altobella, 442 F.2d 310 (7th Cir.), on United States v. McCormick, 442 F.2d 316 (7th Cir.), and similar cases.

In *Rewis* there was a lottery or numbers operation in northern Florida near the Georgia line. Two defendants were Florida residents and there was no proof that they crossed state lines in connection with operation of their lottery. Two other defendants were Georgia residents who traveled to the Florida location to place bets. All defendants were found guilty; the Georgia defendants' convictions were reversed by the Fifth Circuit and those of the Florida defendants were reversed by the Supreme Court. Reviewing the language of the Travel Act and its legislative history, the Supreme Court pointed out the statute was aimed primarily at organized crime and specifically at persons residing in one State while operating illegal activities in another. It was concluded that Congress did not intend the Act to apply

BLEED THROUGH

to criminal activity solely because that activity is at times patronized by persons from another State. 401 U.S. at 811-12. We feel that the *Rewis* opinion does not call for reversal here.

The Travel Act provisions in question read in pertinent part:

> § 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises
>
> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—
>
> * * * * * * *
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
>
> and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.
>
> (b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, . . .

From the terms of the statute itself we feel that the evidence supports the convictions. There was proof to sustain an inference that the defendants caused or aided and abetted the use by Colgan and Amato of interstate telephone facilities in furnishing line information, accepting bets and arranging payoffs with Ferris. True, the calls were placed by Ferris, but the betting transactions depended on more than silence at the other end of the line.[5] We feel the proven use of the interstate facility was sub-

[5] See United States v. Tomeo, 459 F.2d 445, 447 (10th Cir.), cert. denied, 409 U.S. 914, (decided under a different statute, 18 USCA § 1084(a)); but see United States v. Archer, 486 F.2d 670, 683 (2d Cir.) (mere receipt of a foreign call from a federal undercover agent held insufficient for conviction under the Travel Act).

stantial enough to support the convictions, although it was a small part of the overall gambling enterprise (see note 4, supra). There were several transactions conducted by use of an interstate facility, bringing the case within the prohibitions of § 1952(a).[6]

We cannot agree that the Court's interpretation of the statute in *Rewis* calls for reversal of these convictions. The opinion does stress that the Act was aimed "at persons who reside in one State while operating or managing illegal activities located in another." 401 U.S. at 811. Nevertheless the reach of the statute was not limited to such circumstances. Erlenbaugh v. United States, 409 U.S. 239, 247, n. 21. The controlling observation in the *Rewis* case seems to be that the legislative history "strongly suggests that Congress did not intend that the Travel Act should apply to criminal activity solely because that activity is at times patronized by persons from another State." 401 U.S. at 812. This point, focusing on the interstate activity by *others*, is not dispositive here. For, as pointed out, the *defendants* situated their agents where they carried on transactions by using

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[6] See H.R. Rep. No. 966, 87th Cong., 1st Sess. (1961), U.S. Code Cong. & Ad. News (1961), p. 2665.

As originally proposed by Attorney General Kennedy, § 1952 (H.R.6572, S.1653) would have covered only travel; the use of the telephone was to be proscribed by 18 USCA § 1084 (H.R. 7039, S. 1656), which forbids the use of wire communication facilities for the transmission of gambling information in interstate commerce. See Hearings on [H.R. 6572, H.R. 7039] Legislation Relating to Organized Crime Before Subcom. No. 5 of the House Comm. on the Judiciary, 87th Cong., 1st Sess., ser. 16, at 20, 24-25 (1961); Hearings on [S. 1653, S. 1656] the Attorney General's Program to Curb Organized Crime and Racketeering Before the Senate Comm. on the Judiciary, 87th Cong., 1st Sess., at 11, 12, 15 (1961).

The Senate Judiciary Committee amended the travel bill to add an identical section prohibiting the use of "any facility for transportation in interstate or foreign commerce, including the mail." See S.Rep. No. 644, 87th Cong., 1st Sess. (1961). In explaining the amendment Senator Eastland remarked on the floor:

> The committee is of the opinion that the bill should not be limited to the travel of individuals in interstate commerce. Other

BLEED THROUGH

telephones, receiving local and interstate calls. Our examination of the statute, its legislative history and the *Rewis* opinion persuades us that on this record these convictions should be sustained.

We have considered United States v. Altobello, 442 F.2d 310 (7th Cir.), and United States v. McCormick, 442 F.2d 316 (7th Cir.).[7] The *Altobello* opinion reversed a conviction where the only use of interstate facilities was the cashing of a check drawn on an out-of-state bank by a blackmail victim to make a payoff. The subsequent act was division of the money between the defendants. The court said that where the use of the interstate facility and subsequent act were that minimal and incidental to the scheme, no federal crime was committed. Id. at 315.

In United States v. McCormick, 442 F.2d 316 (7th Cir.), a conviction was likewise reversed where the defendant, an In-

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> interstate transportation facilities may be used by organized crime to carry out unlawful activity. The bill therefore has been broadened. . . .

107 Cong. Rec. 13943 (Part 10, 1961).

The conference committee then combined the two sections into the present form, but extended the scope of the Act in the process. For reasons that are not clear, all references to "transportation" in the Act were omitted, except for that which remains in its title. See H.R.Rep. No. 1161, 87th Cong., 1st Sess., 1, 3 (1961).

While there is some question whether Congress intended "use of any facility" to apply to anything other than travel or transportation, courts faced with the question have construed § 1952 to apply to interstate telephone calls. See United States v. Archer, 486 F.2d 670, 679 n. 10 (2d Cir.), and cases cited therein. We also construe the language of the Act to cover the interstate use of telephones. Such interpretation does not violate the maxim that penal statutes be strictly construed, we feel, since "[i]t is sufficient if the words are given their fair meaning in accord with the evident, intent of Congress." United States v. Cook, 384 U.S. 257, 262-63.

[7] See also United States v. Isaacs, 493 F.2d 1124, 1146-49 (7th Cir.), cert. denied, 417 U.S. 976, and United States v. Archer, 486 F.2d 670 (2d Cir.), which bear some similarity to *Altobello* and *McCormick* as to incidental involvement of interstate facilities.

diana lottery operator, advertised in a weekly newspaper for lottery salesmen. Of 15,000 papers distributed, some 200 to 500 were mailed out-of-state. The court said the interstate activities relied on by the Government were the acts of others and were not actively sought or made a part of the defendant's illegal activity, and that there was no showing the lottery depended on or included interstate operations. Id. at 318.

A plausible argument for reversal can be made on the basis of the *Altobello* and *McCormick* cases: the interstate calls were only from one man, Ferris, and the business generated by these interstate calls was not shown to be more than a relatively small part of the gambling business handled by Colgan and Amato. Nevertheless we have some doubt that that court would reverse these convictions since there was repeated use of interstate communications which produced a substantial volume of gambling —although a small part of the proven operation. In any event, we are persuaded we should uphold the convictions on this record. There was repeated use of the interstate communications facilities by defendants' agents, despite out-of-state origin of the calls, and the statute's other requirements were met. Our conclusion is supported by United States v. Sellaro, 514 F.2d 114, 120-21 (8th Cir.), cert. denied, 421 U.S. 1013; see also United States v. LeFaivre, 507 F.2d 1288, 1294 (4th Cir.), cert. denied, 420 U.S. 1004. We therefore reject the argument that the statute, as construed by *Rewis*, does not apply.

c. **The question of knowledge of use of interstate facilities and the jury instruction thereon.**

Lastly, defendants argue that their convictions cannot stand in view of lack of any knowledge by them that Amato or Colgan were receiving interstate calls, relying on United States v. Barnes, 383 F.2d 287 (6th Cir.), cert. denied, 389 U.S. 1040; and United States v. Honeycutt, 311 F.2d 660 (4th Cir.) (Joint

BLEED THROUGH

Brief for Appellants at 18-19). And a closely related argument is made challenging the trial court's inclusion of a "run the risk" instruction.[8]

We are not persuaded that the *Barnes* or *Honeycutt* cases strictly apply here. They involved an attempt by the Government to fasten criminal liability on defendants by imposing responsibility for the conduct of a co-partner which offends another criminal statute—a federal one—even though such federally proscribed conduct was not shown to be necessary or usual to the partnership or known to the co-partners. See United States v. Barnes, *supra* at 292; United States v. Honeycutt, *supra* at 662-63. Here, instead, the proof supports a reasonable inference that the defendants were involved in a gambling operation with Amato and Colgan where the use of phones was apparent and where interstate calls were not unlikely. With this much proved, we feel it was not required under § 1952 to prove further that defendants knew they were causing or aiding and abetting the interstate use of the phone facilities.

Section 1952(a) condemns use of an interstate facility with intent to promote, etc., any unlawful activity, followed by a subsequent required act. It does not impose the additional requirement of intent to use an interstate facility for there to be a direct violation by the defendant's own conduct. United States v. Sellaro, *supra*, 514 F.2d at 120-21 (8th Cir.); United

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[8] The trial court's instruction was as follows (R VII 466-67):

> I further instruct you that with respect to each count of the indictment, if you find that a particular defendant did in fact cause to be used or aid and abet the using of a facility in interstate commerce, it does not matter under the law that he may not have known that his actions involved the use of a facility in interstate commerce or that his actions caused or aided and abetted the use of such facility. If that person performed an act with a specific intent to further a business enterprise involving gambling, which enterprise was in violation of the laws of the State of Colorado, he further ran the risk that his actions caused or aided and abetted the use of such facility in interstate commerce.

States v. LeFaivre, *supra*, 507 F.2d at 1297-98 (4th Cir.); United States v. Erlenbaugh, *supra*, 452 F.2d at 973 (7th Cir.), aff'd, 409 U. S. 239; United States v. Roselli, 432 F.2d 879, 891 (9th Cir.), cert. denied, 401 U.S. 924. Likewise proof was not required here that the defendants, in causing or aiding and abetting use of the phone facilities, knew that they would be used for interstate calls. United States v. LeFaivre, *supra*, 507 F.2d at 1298.

We, therefore, conclude the proof was sufficient without establishing that the defendants knew the phones would be used for interstate calls. It follows also that the instruction to this effect was proper. Cf. United States v. Smaldone, 485 F.2d 1333, 1348-49 (10th Cir.), cert. denied, 416 U.S. 936.

II

The Constitutionality of the Travel Act

Defendants argue that § 1952 violates the First, Fifth and Tenth Amendments and that it is not a valid enactment under the Commerce Clause provisions in Article I, Section 8, Clause 3, of the Federal Constitution. We disagree.

First, defendants say that the First Amendment is violated because the statute abridges freedom of speech and peaceable assembly; that due to the Act's vagueness, one traveling in interstate commerce must hesitate to discuss placing a bet or odds on point spreads, or even the scores of athletic contests, because of the broad terms in the statute such as "facilitate" and others.

The Act has, however, been construed not to apply to others where the proof showed only that they traveled into a State to place bets, Rewis v. United States, 418 F.2d 1218, 1220-21 (5th Cir.) (the holding of the Fifth Circuit on the Georgia resi-

BLEED THROUGH

dents).[9] And the *Rewis* opinion of the Supreme Court held that the statute did not apply to defendants where the proof merely showed their acceptance of wagers by such travelers. The statute covers those who travel in interstate commerce or use interstate facilities with the intent to promote, et cetera, an unlawful activity, and who commit further acts, and we feel such conduct is not sheltered by the First Amendment. The Amendment does not protect such "antisocial conduct which the government has a valid interest in proscribing." Spinelli v. United States, 382 F.2d 871, 890 (8th Cir.), rev'd on other grounds, 393 U.S. 410; United States v. Cerone, 452 F.2d 274, 286 (7th Cir.), cert. denied, 405 U.S. 964.

Second, defendants argue that § 1952 is void for vagueness and hence invalid under Fifth Amendment due process principles. They claim indefiniteness in the statutory terms, "promote, manage, establish, carry on or facilitate . . ." and cite examples of uncertainty such as a janitor coming across a state line to clean up a gambling establishment. Reliance is placed, *inter alia*, on Baggett v. Bullitt, 377 U.S. 360, because of its holding that a required oath including a promise to "promote" respect for the flag and Federal and State institutions was unconstitutionally vague.

Baggett v. Bullitt, however, clearly dealt with indefinite statutes whose terms "abut upon sensitive areas of basic First Amendment freedoms." Id. at 372. That is not the case here. While the phrase including the word "promote" was held impermissibly vague in the First Amendment setting, we are satisfied that the statutory provisions in question here convey sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. United States v. Petrillo, 332 U.S. 1, 8; Turf Center, Inc. v. United

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[9] The Supreme Court expressed approval of this holding in its *Rewis* decision, 401 U.S. at 811, although this question was not before the Court.

States, 325 F.2d 793, 795 (9th Cir.). That there may be some borderline questions to decide is not fatal to the Act. We are reminded that "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree." Nash v. United States, 229 U.S. 373, 377; United States v. Powell, . . . U.S. . . ., . . .; 44 U.S.L.W. 4010, 4012.

In the context of the defendants' conduct and the statutory terms in question, we see no constitutional infirmity. And since the case is not one of intrusion into areas protected by the First Amendment, we should not consider the further hypothetical cases suggested, being confined to the facts of the case at hand. United States v. Powell, *supra*.

Third, defendants argue that § 1952 violates equal protection principles incorporated by the Fifth Amendment since it operates differently in States where gambling is lawful from those where it is outlawed. We agree with the courts which have rejected this contention. United States v Schwartz, 398 F.2d 464, 467 (7th Cir.), cert. denied, 393 U.S. 1062; Turf Center, Inc. v. United States, *supra*, 325 F.2d at 795-96; United States v. Ryan, 213 F.Supp. 763, 766 (D. Colo.).

Last, defendants say that regulation of gambling is not a power conferred on the Federal Government and hence § 1952 is invalid under the Tenth Amendment. We feel the argument is without merit. See Marshall v. United States, 355 F.2d 999, 1004 (9th Cir.), cert. denied, 385 U.S. 815.

BLEED THROUGH

III

The Electronic Surveillance Issue

a. The claim of taint from use of State wiretap information

Defendants argue the prosecution is unlawful due to use by the Federal agents of illegal wiretapping information obtained from the Denver police, or that in any event there should be a remand for further proceedings on the taint issue, with directions that F.B.I. air telecommunications, not furnished to defendants previously, be made available to them (Joint Brief for Appellants at 31). Reliance is placed on Alderman v. United States, 394 U.S. 165; Nolan v. United States, 423 F.2d 1031 (10th Cir.), cert. denied 400 U.S. 848; and United States v. Alderisio, 424 F.2d 20 (10th Cir.).

The issue was raised by two pretrial motions to suppress all evidence of intercepted telephone communications and proof obtained as a result of leads therefrom for the reason that the evidence was illegally obtained (R IX 24-28). The motions were both denied. One motion was denied after a pretrial evidentiary hearing at which the trial court stated that there was no indication that there was or is any evidence that the Government has obtained as a result of electronic surveillance by the Denver Police Department, and therefore, there being no such evidence there was nothing to suppress and the motion was denied (R III 241).

The background facts concerning the issue follow. In February, 1971, the Denver police obtained a State Court order to intercept telephone conversations at the residence of one DeLuzio in Denver. During the wiretap, conversations of defendants Smaldone and Villano were recorded. Villano's voice was also identified in a second State wiretap conducted in 1972.

At the hearing on the motion to suppress Sergeant Mulnix testified. Mulnix had been in charge of the State's wiretaps. He said that to his recollection, none of the tapes or transcripts of the recorded conversations were ever furnished to federal agents. He testified that on several occasions he had discussed Villano and Smaldone with agents Malone and Bush of the Denver FBI office and had informed them of the existence of the DeLuzio wiretap. He said that the discussions were of a general nature and that no FBI agent had ever requested the tapes or transcripts of the wiretap.

Agent Malone testified that in February, 1971, the Denver FBI office received a call from FBI Agent Anderson in Nebraska. Anderson told Malone that he had received information that a person in Nebraska was placing wagers with a bookmaker in Colorado by telephone. Malone said that he first became aware that Villano was involved in the investigation in March, 1971, when he learned through a confidential informant in Colorado that Villano was taking wagers at a certain location. The phone number at this location matched the phone number obtained from the Nebraska FBI office.

It was also some time in March, 1971, that Sergeant Mulnix had informed Malone of the DeLuzio wiretap, saying: "We are picking up information that DeLuzio is involved with the Smaldones in bookmaking." (R III 135). However, Malone testified that he had known since 1968 that defendants Villano and Smaldone were involved in bookmaking activities. Malone also said that as a result of information from the Nebraska FBI and his Colorado informant,[10] several persons

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[10] Malone testified that in February, 1971 they had received a call from Agent Anderson in Nebraska who said he had received information indicating a person in Nebraska was placing wagers with a bookmaker in Colorado by phone. In subsequent calls to Anderson a correction to the phone number in Denver was obtained. With that correction and information received from a Colorado informant, and by going to this location, Malone was able to verify the number. Malone received information from Omaha showing that several calls

BLEED THROUGH

were identified and called before a federal grand jury. Smaldone's involvement in the gambling activities in question here was discovered during testimony before the grand jury. Special Agent Bush testified to the same effect. He also said that he had talked with Sergeant Mulnix frequently. However, Bush's only inquiry concerning Villano was to ask Mulnix if there were any indication of interstate conversations on the DeLuzio wiretap, and Mulnix replied in the negative. Both Malone and Bush testified that they had never listened to the tapes nor read the transcripts of them (R III 140, 204). And they said that none of the witnesses or evidence for this case developed as a result of any information received through any wiretap or electronic surveillance (R III 182, 211).

For their evidence of taint, the defendants rely primarily on two police reports sent by the Denver Police to the Denver FBI office (Def. Exs. G and H). These were factual summaries concerning State cases filed against various individuals. They contained affidavits making reference to the 1971 DeLuzio wiretap and the 1972 wiretap. Agent Bush said that the first report came into the FBI office some time in April, 1971. Bush said he looked through the report but that no investigation was made as a result of it. Agent Malone testified that the DeLuzio report first came to his attention in May or June, 1971; that he read it; that it generally referred to conversations; but that it did not contain the exact words that were used. He further said that in 1972, Mulnix told him there had been another wiretap in which Villano's voice was overheard. Malone read the second case summary concerning that wiretap, but no action was taken as a result of receiving the report.

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were to the same number indicated by a Colorado informant who had told Malone about a location where Villano was conducting his bookmaking (R III, 132-33, 178-79). While the police reports (Def. Ex. G and H), gave information that both defendants were involved in gambling, Malone said he had known for several years of their gambling activities (R III 141-42).

Defendants argue that although Agents Malone and Bush testified that information for the federal charges came from independent sources, the agents did have information on the existence and contents of the wiretaps which they could not put out of their minds. However, the defendants have not pointed to specific information the FBI was supposed to have received as a result of the State investigation. The police summary from the DeLuzio wiretap merely discusses in general Villano's bookmaking which was already known to Malone. The DeLuzio report is more informative as to defendant Smaldone's involvement, referring to the fact she was accepting wagers from DeLuzio at her residence on Pearson Way in Denver.

Despite the considerable information concerning gambling activities of both defendants in the reports, both Special Agents testified that information for these federal charges came from independent sources. The testimony at the adversary hearing satisfied the trial court and it was found that there was no indication that there was or is any evidence that the Government had obtained as a result of the Denver Police surveillance. The court concluded that there being no such evidence, the motion to suppress would be denied.

The initial burden to show that an unlawful surveillance occurred rested on the defendants. Nolan v. United States, *supra*, 423 F.2d at 1041. Where such an illegal search has come to light, the Government has the ultimate burden of persuasion to show that its evidence is untainted. Alderman v. United States, *supra*, 394 U.S. at 183. At the same time, the defendant is required to "go forward with specific evidence demonstrating taint." Id.; *Nolan* at 1041. Without considering whether an unlawful surveillance was shown,[11] the trial court

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[11] The defendants argue that the Government admitted the unlawfulness of the Denver wiretaps. At the suppression hearing Government counsel did state that the wiretap "would perhaps not pass

BLEED THROUGH

found there was no Government evidence resulting from the Denver Police Department's electronic surveillance and denied the motion to suppress (R III 241). We feel the finding is amply supported and should be sustained.

b. **The claim of error in denying access to the airtels**

The defendants claim that the trial court erred in denying them an opportunity to examine FBI air telecommunications (airtels).[12] Defendants say they were entitled to examine the airtels and other documents, which are not specified, to proceed with the evidence to show that the case was tainted. The argument is that *Alderman* should not be limited to revealing the wiretaps themselves, but that the rationale of *Alderman* should be applied equally to the fruits of the recordings (Joint Brief for Appellants at 27, 29), relying on United States v. Alderisio, 424 F.2d 20 (10th Cir.).

In *Alderisio*, this court held that since the tapes and complete logs of them were lacking, the defendant was entitled to examine that portion of the airtels relating to the monitored conversations

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federal muster because of the lack of reporting to the Court . . ." (R II 120). The trial court apparently found it unnecessary to determine whether the defendants' initial burden of showing unlawfulness of the surveillance was met, and instead found that no showing of taint was made. Since we feel that this finding is supported by the record, we likewise need not decide whether an unlawful surveillance was demonstrated.

[12] Airtels (air telecommunications) are a form of inter-office communication between FBI field offices. Often, but apparently not always, airtels are used to transmit summaries of information contained in logs of recorded conversations. See, *e.g.*, United States v. Alderisio, 424 F.2d 20, 22 (10th Cir.); United States v. Battaglia, 432 F.2d 1115, 1117 n. 1 (7th Cir.), cert. denied, 401 U.S. 924; United States v. Mirro, 435 F.2d 839, 841 (7th Cir.); United States v. Hoffa, 436 F.2d 1243, 1247 (7th Cir.), cert. denied, 400 U.S. 1000.

not described in the logs, "if any there be." Id. at 23. Here, however, the transcripts of the monitored conversations were furnished to the defendants (Joint Brief for Appellants, 27). The Supreme Court has recognized that "[n]othing in Alderman . . . requires 'an adversary proceeding and full disclosure for resolution of every issue raised by an electronic surveillance.' " Taglianetti v. United States, 394 U.S. 316, 317. In fact, the general rule appears to be that the defendant is entitled to see a transcript of his own conversations, and nothing else, having no right to rummage in Government files. Id. at 317; *Alderman, supra* at 185.

The Court has observed that the defendant, armed with specified records of overheard conversations and with the right to cross-examine appropriate officials in regard to the connection between those records and the case made against him, may need or be entitled to nothing else. Id. Here the trial court determined that the defendants were not entitled to the additional records. We find no abuse of the discretion which rested on the trial court. *Alderman, supra* at 185; United States v. Kane, 450 F.2d 77, 82 (5th Cir.), cert. denied, 405 U.S. 934; United States v. Hoffa, 436 F.2d 1243, 1247 (7th Cir.), cert. denied, 400 U.S. 1000; United States v. Mirro, 435 F.2d 839, 841 (2d Cir.).[13]

c. **The 1964 electronic surveillance**

On the first day of the trial the Government reported from a complete check through federal agencies that in 1964 an IRS agent had monitored Villano's telephone calls and that Villano

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[13] The trial court examined the airtels in camera and stated that they contained no indication of use by the Denver or Omaha office of any improper source, particularly the electronic surveillance by the Denver Police Department, as the basis for the investigation or indictment, and denied access to them to the defendants (R III, 237-38). We have examined the same material and are satisfied there was no error or abuse of discretion by the trial court.

BLEED THROUGH

had been interviewed by an IRS agent wearing a recorder (R V, 5-6). Defense counsel requested a hearing to determine the extent of any taint from this surveillance. The Government objected, arguing that 18 USCA § 3504(3) barred any consideration of taint arising from such circumstances, and that the previous hearing on the State wiretaps had demonstrated that the Government's investigation of defendants' Travel Act violations was not connected with any other such surveillance. The trial court denied the defense request for a hearing without stating its reasons.

In resisting this claim of procedural error by the defendants, the Government renews both arguments made to the trial court. Without reaching the issue of the constitutionality of 18 USCA § 3504(3), which defendants challenge, we agree with the Government's alternative position. Evidence unlawfully obtained need not be suppressed if the causal connection between the unlawful Government conduct and the proof in question has "become so attentuated as to dissipate the taint. Nardone v. United States, 308 U.S. 338, 341; Wong Sun v. United States, 371 U.S. 471, 491. Agent Malone had previously testified he had no knowledge of any electronic surveillance of the defendants by federal agencies (R III, 164-65). There was no showing of a connection or similarity between Villano's 1964 operations and the 1971 conduct under prosecution. We must agree the request for the hearing was properly denied.

IV

Pre-Indictment Delay

Defendants assert that there was prejudicial delay from the time of the Government's being informed of this case until indictment. They point to the FBI having had information of a possible violation in February, 1971, and the indictment not having been returned until January 11, 1974. They claim loss

of evidence and prejudice in violation of their Sixth Amendment right to a speedy trial and their Fifth Amendment due process rights, relying on Marion v. United States, 404 U.S. 307, Barker v. Wingo, 407 U.S. 514, and similar cases (Joint Brief for Appellants, 48-51). The trial court denied a motion to dismiss on these grounds, without comment (R III 240).

The claim of prejudice is based primarily on the fact that the Government requested preservation of certain phone records, which were introduced (Pl. Ex. 1-4), while other phone records that would have aided the defense were destroyed pursuant to a policy of the telephone company to destroy such phone records after six months. Defendants point to a serious contradiction in Ferris' testimony when he stated on cross-examination that his calls from Nebraska occurred a year earlier than the indictment period (R V 129, 134).[14] Using this as a predicate, defendants argue that missing records of calls from Ferris' Valentine, Nebraska, telephones would have further contradicted much of Ferris' testimony.[15] Moreover, they say other lost records would have been relevant to determine whether long distance calls were made by defendants or by Colgan or Amato, and that some witnesses became unavailable because of the delay (Joint Brief for Appellants, 49-50).

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[14] Ferris testified before the grand jury, and at trial, that his betting was during the 1969-1970 season and that this was the only football season when he made bets through the Denver numbers. The record shows that the defendants had the grand jury transcript, cross-examined effectively with it, and developed the contradiction before the trial jury. On redirect, however, Ferris corrected his testimony to correspond with the indictment period, and the jury apparently accepted it.

[15] The only records of interstate calls introduced into evidence were those from Ferris' North Platte, Nebraska, telephones. See note 4, *supra*. Ferris also testified that he made calls from his home and business in Valentine, Nebraska, but records of these numbers were not introduced, apparently because they had been destroyed. Other records lost included the long distance records for the phones used by Amato and Colgan, and for any phones to which the defendants had access.

BLEED THROUGH

We cannot accept the claim of substantial prejudice to the defendants. Even if the lost Valentine phone records had shown that no calls were made to the Denver numbers of Colgan and Amato, the impeachment value would have been minimal. Ferris testified that he made calls from North Platte, and this was supported by the records (see not 4, *supra*). He said there were some weeks during the indictment period in which he did not bet, and a showing that no calls were made from the other locations would have detracted but little from the showing of repeated calls supported by the records.

As for the destruction of the records for defendants' phones and for the phones used by Amato and Colgan, we see no way in which they could have aided defendants and none has been demonstrated. Nor have defendants stated with any particularity what witnesses were unavailable to them as a result of the delay, or for that matter, what exculpatory testimony would have been offered. See United States v. Merrick, 464 F.2d 1087, 1090-91 (10th Cir.), cert. denied, 409 U.S. 1023.

We are satisfied that there was no showing of substantial prejudice to the defendants' right to a fair trial or that the delay was an intentional device to gain tactical advantage over the accused, thus denying due process. United States v. Marion, *supra*, 404 U.S. at 324; United States v. Merrick, *supra*, 464 F.2d at 1090-91. The indictment was filed well within the five-year limitation period, 18 USCA § 3282, thus affording the general protection provided by law against obscuring of facts by the passage of time and punishment for acts of the far distant past. *Marion, supra* at 323. The speedy trial guarantee began operating when the defendants were indicted. *Marion, supra* at 313, and there is no showing of excessive delay or prejudice thereafter since the trial commenced four months later. We must reject the claims of violation of Fifth and Sixth Amendment rights.

V

Double Jeopardy

Defendants claim violation of the Fifth Amendment prohibition against double jeopardy. The argument is that they were charged, convicted and punished by the Colorado State courts for gambling violations during the same continuous periods of time covered by this federal indictment, and that the additional prosecution and punishment by the Federal Government was barred, relying on Waller v. Florida, 397 U.S. 387; United States v. Crawford, 466 F.2d 1155 (10th Cir.), *inter alia.*

It is clear that the double jeopardy argument lacks merit. The *Waller* case in no way departs from the established rule permitting successive prosecutions by the Federal and State governments as separate sovereigns. *Waller*, supra at 392, and cases there cited; United States v. Smaldone, 485 F.2d 1333, 1343 (10th Cir.), cert. denied, 413 U.S. 936. The *Waller* opinion only barred separate prosecutions by a State court and a municipal court since the judicial power of both courts sprang from the same organic law. *Waller, supra* at 393.

Nor does United States v. Crawford, *supra*, aid the defendants. Relief was granted there against a second conviction because of the peculiar factual circumstances. The defendant had served a Wyoming sentence for having stolen the subject car in Wyoming (a reduced State charge of petty larceny), and was later convicted in Federal court under the Dyer Act for having stolen the car in Colorado and transporting it to Wyoming. The court said the defendant could not have been guilty of both these offenses, nor could he have been guilty of a Dyer Act violation and the original Wyoming charge of receiving the stolen property in Wyoming. In either event the factual premise for the State conviction negated guilt under the Dyer Act. The case was one of relief under the court's supervisory power on the basis of

BLEED THROUGH

these special facts and inherent unfairness, and not due to any prohibition of separate federal and state prosecutions. 466 F.2d at 1156-57.

We must reject the double jeopardy argument as untenable.

VI

Multiple Counts and Separate Fines

Defendants further assert that they were unlawfully subjected to prosecution under multiple counts and given multiple fines.[16] They point out that the proof did not focus on their activities separately as to any period of time; and that their operations of Amato and Colgan overlapped in time; that there was only one interstate bettor. They say the Government arbitrarily charged separate offenses when the statute is concerned with "unlawful activity" which cannot exist without continuing activity, and that the multiple convictions and fines violate the intent of Congress and amount to double jeopardy and cruel and unusual punishment.

Bell v. United States, 349 U.S. 81, and United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, clearly tell us that in construing federal statutes to decide the allowable unit of prosecution, doubt will be resolved against turning a single transaction into multiple offenses. *Bell, supra* at 84; *Universal C.I.T. Corp., supra* at 221-22. However, the statute seems clear to us here, as the court said in United States v. Polizzi, 500 F.2d 856,

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[16] As stated, the three counts covered three successive time periods. Defendant Villano was sentenced to concurrent sentences of one year and a day on each count, plus separate fines of $750 on each count, or a total fine of $2,250. Defendant Smaldone's sentence was suspended and she was placed on two years' concurrent probation on each count. She was also given fines of $750 on each count, or a total fine of $2,250.

897 (9th Cir.), cert. denied, 419 U.S. 1120: "The offense defined is an act of travel or use of an interstate facility, with the requisite intent, plus subsequent performance of another act of the kind specified in the statute." The continuing "unlawful activity" is part of the required elements, but the key element for the federal offense is the act of travel or use of interstate facilities. This follows the persuasive logic of Judge Murrah in a similar situation. Mitchell v. United States, 142 F.2d 480, 481 (10th Cir.), cert. denied 323 U.S. 747. Hence charging separate offenses here was not unwarranted and the separate convictions and punishment given were not improper on this proof.

We find that these objections to the separate convictions and the sentences are all without merit.

We have examined the several remaining contentions of defendants concerning, among other things, the denial of a severance, denial of a change of venue, sufficiency of telephone voice identification, and jury instructions. We see no substance to the points and no further discussion is necessary. We are satisfied that the defendants had a fair trial, free of prejudicial error.

Affirmed.

BLEED THROUGH

APPENDIX B

JUDGMENT OF COURT OF APPEALS, DATED JANUARY 8, 1976, RE VILLANO

United States Court of Appeals
for the Tenth Circuit

November Term—January 8, 1976

Before The Honorable Oliver Seth, The Honorable William J. Holloway, Jr., and The Honorable James E. Barrett, Circuit Judges.

United States of America,
Plaintiff-Appellee,
vs.
Pauline Smaldone,
Defendant-Appellant.
} No. 74-1464.

A true copy

Teste

Howard K. Phillips
Clerk, U. S. Court of
Appeals, Tenth Circuit

Mary A. Sherman
Deputy Clerk

(Seal)

This cause came on to be heard on the record on appeal from the United States District Court for the District of Colorado, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed. It is the further order of this court that Pauline Smaldone, appellant, shall, within ten (10) days from and after the date of the filing of the mandate of this court in the district court, surrender himself to the custody of the United States Marshal for the District of Colorado in execution of the judgment and sentence imposed upon him.

/s/ Howard K. Phillips.
Clerk

J-2 5/75

BLEED THROUGH

APPENDIX C

JUDGMENT OF COURT OF APPEALS, DATED JANUARY 8, 1976, RE SMALDONE

United States Court of Appeals
for the Tenth Circuit

November Term—January 8, 1976

Before The Honorable Oliver Seth, The Honorable William J. Holloway, Jr., and The Honorable James E. Barrett, Circuit Judges.

United States of America,
Plaintiff-Appellee,
vs.
Paul Clyde Villano,
Defendant-Appellant.

No. 74-1463
(D.C. No. 74-CR-25)

A true copy

Teste

Howard K. Phillips
Clerk, U. S. Court of
Appeals, Tenth Circuit

Mary A. Sherman
Deputy Clerk
(Seal)

This cause came on to be heard on the record on appeal from the United States District Court for the District of Colorado, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed. It is the further order of this court that Paul Clyde Villano, appellant, shall, within ten (10) days from and after the date of the filing of the mandate of this court in the district court, surrender himself to the custody of the United States Marshal for the District of Colorado in execution of the judgment and sentence imposed upon him.

/s/ Howard K. Phillips
Clerk

J-2 5/75

BLEED THROUGH

APPENDIX D

ORDER OF COURT OF APPEALS, DATED FEBRUARY 17, 1976, DENYING REHEARING

January Term—February 17, 1976

Before The Honorable David T. Lewis, Chief Judge, The Honorable Delmas C. Hill, The Honorable Oliver Seth, The Honorable William J. Holloway, Jr., The Honorable Robert H. McWilliams, The Honorable James E. Barrett, and The Honorable William E. Doyle, Circuit Judges.

United States of America, Plaintiff-Appellee, vs. Paul Clyde Villano, and Pauline Smaldone, Defendants-Appellants.	Nos. 74-1463 74-1464

This matter comes on for consideration of the petition for rehearing with suggestion for rehearing en banc which was filed by the appellants in the captioned cases.

Upon consideration whereof, it is ordered that the petition for rehearing is denied by Circuit Judges Seth, Holloway and Barrett to whom the cases were submitted.

The Petition for Rehearing having been denied by the original panel to whom the cases were submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc,

Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

A true copy

Teste

Howard K. Phillips
Clerk, U. S. Court of
Appeals, Tenth Circuit

By Mary A. Sherman
Deputy Clerk

(Seal)

/s/ Howard K. Phillips
Clerk

BLEED THROUGH